IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO._____

TERRY LINNELL HARPER, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

Certiorari from the decision of United States Circuit Court of Appeals, Fifth Circuit, Case No. 10,620

BRIEF IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

OPINION OF THE COURT

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is found in the record filed herewith. (R. 239-241).

JURISDICTION

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The date of the judgment complained of in the United States Circuit Court of Appeals for the Fifth Circuit is October 18, 1943, and a motion for rehearing was made to the United States Circuit Court of Appeals for the Fifth Circuit, as provided and within the time allowed by law, which motion for rehearing was denied by the United States Circuit Court of Appeals for the Fifth Circuit on December 3, 1943. The final decision of the United States Circuit Court of Appeals for the Fifth Circuit herein complained of is of the date of December 3, 1943.

ARGUMENT

The most important question involved in this certiorari is the judicial power of review touching the action, conduct and findings of an administrative or quasi-judicial body, board, or commission.

The Supreme Court of the United States has laid down the rule that whenever an administrative body created by the legislature acts within the sphere of its authority in a fair and unprejudiced manner, its findings are not subject to collateral attack or judicial review of the civil courts; but where a fair hearing has been denied, where the board has violated the rules specifically ordering its conduct, where the administrative body has acted unfairly, arbitrarily and capriciously and there is a deprivation of rights either of person or property, the acts will be reviewed by the court, and the judiciary will not be ousted by any legislative arrangement designed to preclude judicial determination.

In the case of St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 49 to 54, the Court entertained jurisdiction for the review of the findings of the Secretary of Agriculture on the allegation that the rates fixed were confiscatory despite the insistence on the part of the government agency that such findings are not subject to review. The Court said on that occasion:

> "When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of facts which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in accordance to fair hearing and acting upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91; Virginia Ry. Co. v. United States, 272 U. S. 658, 663; Tagg Bros. & Moorhead v. United States, supra, P. 444, Florida v. United States, 292 U. S. 1, 12."

Where, however, the administrative body has been unfair, arbitrary and capricious to the deprivation of the rights of either person or property, or both, without due process of law

and thus overstepping the Constitutional guarantees and the provisions of the general law, as in the instant case, then the courts will review and rectify the matter. Continuing in quoting from the same opinion we read the following:

> "But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitations by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subserviant. It is not difficult for them to observe the requirements of the law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

In accordance with the above statement the regulations prescribing the actions of the Selective Service System cannot preclude and prevent juricial review by the statement that the action of the Local Board shall be final, when there is unfairness, arbitrariness and capriciousness involved in

the classification as in the instant case; also the Court will take jurisdiction in reviewing the case where the Local Board has over-stepped the bounds of the regulation in several instances. If this were not so, then the Constitutional guarantees would be of little worth.

The Supreme Court of the United States in the case of Interestate Commerce Commission v. Louisville and Nashville Ry. Co., 227 U. S. 88, 91, clearly indicates the result of an unfair and inadequate hearing before an administrative board. It said:

> But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially expressed in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'. Tang Tun V. Edsell, 223 U. S. 678, 681; Chin Yoh v. U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272; or if the facts found do not, as a matter of law, support the order made, United States v. B. & O. S. W. RR, 226 U. S. 14; Cf. Atlantic C. L. v. North Carolina Corp. 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224 U. S. 510; I. C. C. v. Illinois Central 215 U. S. 452, 470;

Southern Pacific Co. v. Interstate Com. Comm., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247."

It is true that in a criminal action such as this the court is not empowered to dictate to the local board as to what it should do, but certainly this court has a right to decide whether or not the Petitioner has been deprived of his legal defense when the local board has acted arbitrarily and capriciously toward Petitioner.

In the case of Union Bridge Company v. United States, 204 U. S. 364, a criminal prosecution was instituted against a bridge company for its failure to obey the order of the Secretary of War to remove an obstruction to navigation by making higher a bridge. This order of the Secretary of War was made pursuant to the power vested in him by Section 18 of the Act of March 3, 1899, (30 Stat. at L. 1121, 1153). The Secretary gave notice, conducted hearings, considered the evidence, and then made his order. Upon the company's failure to comply, the United States Attorney in the District was notified and a criminal prosecution was instituted. (Note the similarity in procedure to that under the Selective Training and Service Act.) In deciding that the Act did not improperly delegate authority to the Secretary of War, the court pointed out that the Act did not give the Secretary arbitrary power but only the power to act reasonably. Said the court significantly:

> " . . . . . Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted."

Again in Monongahlea Bridge Co. v. United States, 216 U. S. 177 (1910) the same objections were raised as in the Union Bridge Case. The Court decided similarly, observing:

> "It does not appear that the Secretary disregard the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress."

Thus the Court observed that arbitrariness on the part of the Secretary of War was a proper matter of defense.

Looking into the future, when counsel suggested extreme cases of arbitrariness, the court commented, at page 195:

> "It will be time enough to deal with such cases and when they arise. Suffice it say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

It can thus be seen from the above, although dicta, that the Supreme Court was of the opinion that if it were shown that the action of the administrative officer were arbitrary, such evidence would be considered by the court in a criminal prosecution, in determining whether the defendant's constitutional rights had been abridged.

In two other cases involving enforement of administration determinations, although not criminal prosecutions, the Supreme Court has indicated that administrative arbitrariness is a defense to enforcement proceedings.

In Hagar v. Reclamation District No. 108, 111 U. S. 701 (1884), the Court said:

> " . . . . The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded."

Again in Bradley v. City of Richmond, 227 U. S. 477, (1913), another administrative enforcement action, the Court commented:

> " . . . . . Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification."

See also in this connection St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 49 to 54; Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88, 91, Virginia Ry. Co. v. United States, 272 U. S. 658, 663; and Florida v. United States, 292 U. S. 1, 12.

Applying the facts in the instant case to the law laid down in the foregoing citations, Petitioner contends that the action of the Local Board, empowered to classify him, was palpably unfair, unreasonable, unjust, arbitrary, capricious, improper, and contrary to the provisions of the Selective Service Act. There is not one single, solitary word in the record showing that the Local Board at any time ever gave a formal consideration to the contentions of registrant that he was entitled to be placed in Classification IV-D.

Petitioner submits that the ruling of the Court deprived him of his constitutional right of a trial by jury, in that under said ruling the local draft board and/or appeal board had previously adjudicated all facts touching defendant's only defense to the indictment in the instant case. To so hold, to allow defendant to be convicted by a board and estop him from going into the findings of said board, would clearly be contrary to all fundamentals of the Constitution and statutory laws. There are no such things as estoppels touching criminal defenses. For the Constitution to guarantee to a defendant the right of a jury trial and, when a defendant demands such right he is met with the propsition that some board or some committee has already adjudicated the controlling factors in his trial, certainly the guarantee is without force or effect of any kind.

Petitioner submits, further, that under the ruling of the trial court in the instant case, as set out, he was denied his constitutional right as set out in the Sixth Amednment to the Federal Constitution: "In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . . ", in that petitioner instead of having his guilt or innocence determined by a jury, was found guilty of the offense charged by an administrative board consisting of three members several weeks prior to his arrangement under the indictment in the instant case.

Further, petitioner was denied "due process" as guaranteed him in the Fourteenth Amendment of the Federal Constition.

That section of the Selective Training and Service Act of

1940, as amended, particularly pertinent to the determination of the within case reads as follows:

> 601.5 Delinquent. A 'delinquent' is (1) any man required under the Selective Service Law and direction given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty; or (2) any registrant who, prior to his induction into military service, fails to perform, at the required time or within the allowed period of given time, any duty imposed upon him by the Selective Service Law and directions given pursuant thereto and has NO VALID REASON for having failed to perform that duty."

From the above and foregoing Section, it is plain that Congress envisioned the possibility of a registrant possessing some VALID REASON for a refusal to report. Further, it is clear, in the absence of other provisions, that Congress had in mind the right and power on the part of the registrant to assert this VALID reason after all procedural steps had been taken by the Local Board. There remained but one place, and one place only, under the Act, where the registrant could assert his valid reason for not reporting. In the absence of some provision in the Selective Service Act giving to some specified tribunal the power to dispose of this vested right, petitioner submits that the trial jury itself was the only source through which petitioner could have his day in court. For the trial judge to usurp the power and authority to determine this "valid reason" would be a mere nullity, and a rank violation of petitioner's constitutional right to a jury trial.

We respectfully submit that the certiorari prayed for should be granted, and the case remanded for another trial, and the judgment in this case reversed and set aside.

Respectfully submitted,
Colon J. Cogdell, Brunswick, Ga.
H. F. Rawls, Nahunta, Georgia.

State of Georgia
County of Glynn

I, Colon J. Cogdell, of counsel for petitioner, do hereby certify that I have this day served a copy of the within petition and brief upon respondent, United States of America, by giving a copy of same to the Attorney General of the United States, Washington, D. C.

This the 31st day of December, 1943.

COLON J. COGDELL